ABDUL KADIR MOHAMAD *a*

v.

KAMARULZAMAN MOHD ZIN & ANOR

HIGH COURT MALAYA, JOHOR BHARU *b*
ABDUL MALIK ISHAK J
[CIVIL APPEAL NO: 12-44-1998]
29 JANUARY 2000

EVIDENCE: *Adverse inference - Omissions in police report - Failure to state facts alleged - Whether presumption arose* *c*

EVIDENCE: *Adverse inference - Witness not produced - Whether a withholding of evidence - Whether presumption arose - Evidence Act 1950, s. 114(g)*

CIVIL PROCEDURE: *Pleadings - Defence - Failure to incorporate defence into statement of defence - Whether proper* *d*

ROAD TRAFFIC: *Negligence - Collision between two vehicles - Liability of parties - Sketch plan by police witness - Whether court able to determine liability* *e*

CIVIL PROCEDURE: *Damages - Assessment of damages - Loss of sight of right eye - Pain and suffering and loss of amenities - Loss of earnings - Special damages*

This action arose from a motor vehicle accident involving the plaintiff and the defendants while the vehicles were travelling from opposite directions. The learned sessions court judge gave judgment in favour of the plaintiff and held the first defendant who was acting as an agent for the second defendant wholly liable. They were ordered to pay a judgment sum of RM101,993. Being dissatisfied with the decision, the defendants now appealed. *f* *g*

The court in this instance concentrated on the issues of liability and quantum. An independent witness, one sergeant Abdul Rahim (PW1) testified that when he arrived at the scene of accident, both the vehicles were there and they appeared damaged at the front right portions. He forthwith caused the sketch plan to be prepared. *h*

The plaintiff testified that he kept on to his lawful side of the road when the defendant's vehicle encroached onto his path which resulted in the collision. The first defendant disputed the depiction in the sketch plan and drew what he perceived to be the correct version of what took place. He claimed that *i*

the plaintiff was a mere passenger and not the driver of the motor car. However, that fact was not incorporated into his statement of defence. He further contended that the accident occurred when the plaintiff was trying to overtake another vehicle in a haphazard manner. Neither was that fact stated in the police report lodged by him. The first defendant made several other contentions that were omitted from his police report. He now claimed plaintiff's negligence or contributory negligence for the whole accident.

Held:

[1] Failure for the first defendant to incorporate a defence into his statement of defence could be a perilous action to take. For reasons of practice, justice and convenience a party is always required to make it clear what line of justice they were adopting.

[2] The omissions made by the first defendant in his police report were in regard to material facts and such omissions were fatal. Even though the report might not invariably impeach the first defendant's credit, such failure to mention those material omissions might be construed adversely against him.

[3] The sessions court had made it abundantly clear that as both parties gave an unclear account of the circumstances of the accident, it was justified to rely on the sketch plan and from it draw the necessary liability of each party. Since the sketch plan showed that the glass fragments and its location were on the plaintiff's right of way, it could be inferred that the point of impact of the accident was at the plaintiff's lawful side of the road.

[4] The sessions court found that there was no evidence that either the plaintiff or members of the public could have altered the sketch plan. Therefore, it was reasonable to conclude that PW1 drew the sketch plan based on what he saw upon arrival at the scene of the accident. Hence, the sessions court had rightly relied on the sketch plan as evidence from a credible witness.

[5] The plaintiff's version of the circumstances of the accident tallied with his police report, whilst the first defendant's version did not accord favourably with his. Therefore, there were special circumstances to show that the first defendant was negligent.

[6] Despite alleging that there were two other passengers in the motor car with him at the time of accident, the first defendant failed to call them to corroborate his version. Under the circumstances, a presumption was raised against the first defendant under s. 114(g) of the Evidence Act

1950, *ie*, that the evidence was held back because it would have been unfavourable to the first defendant's case.

[7] As the collision was on the lawful path of the plaintiff, it could be inferred that the plaintiff had taken reasonable care for his own personal safety. Therefore, there was no contributory negligence on the part of the plaintiff and the first defendant was found wholly blameworthy for the road accident. The brut of negligence should be shouldered by the defendants.

[8] The plaintiff's right eye became blind and his face was seriously injured as a result of the accident. The court confirmed the sessions court's award of RM70,000 for pain and suffering and loss of amenities after taking into account that an award should keep up with the times.

[9] The plaintiff claimed for loss of earnings as a part-time shop assistant and a car salesman. Since the parties had agreed that the part-time earnings should be computed at RM8,000 the court affirmed it accordingly.

[9a] For loss of earnings as a car salesman, the court relied on the corroborative evidence of the plaintiff's ex-employer, salary vouchers and income tax "Borang J "to affirm the sessions court's award of RM13,236 after taking into account the multiplicand of RM1,103 per month.

[9b] Since both parties had agreed before the trial court that special damages be computed at RM10,757, that award was affirmed accordingly.

[Appeal dismissed with costs; judgment sum of RM101,993 affirmed.]

Case(s) referred to:

Abdul Hamid v. Ooi Teik Ean & Anor [1979] 1 MLJ 244 ***(refd)***
Abdul Mokhti Hj Ahmad v. Idris Ibrahim [1977] 2 MLJ 85 ***(refd)***
Abdul Rahman v. Soon Ah Hai [1978] 2 MLJ 31 ***(refd)***
Abdul Rahman Abdul Karim v. Abdul Wahab Abdul Hamid [1996] 2 CLJ 455 ***(refd)***
AG v. Lord Mayor of Sheffield [1912] 106 LT 367 ***(refd)***
Browne v. Dunn [1893] 6 R 67 ***(refd)***
Duke v. Wisden [1897] 77 LT 67 ***(refd)***
Guan Soon Tin Mining Co v. Wong Fook Kum [1969] 1 MLJ 99 ***(refd)***
Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9 ***(refd)***
Haron v. Macaulay [1969] 1 MLJ 169 ***(refd)***
Herchun Singh & Ors v. PP [1969] 2 MLJ 209 ***(refd)***
Lim Gaw Teong & Anor v. Daniel & Anor [1968] 1 MLJ 277 ***(refd)***
MA Clyde v. Wong Ah Mei & Anor [1970] 2 MLJ 183 ***(refd)***
Milbank v. Milbank [1900] 1 Ch 376 ***(refd)***
Mohamed Abdullah v. Chah Hea Seng [1980] 2 MLJ 282 ***(refd)***
Mohamed Salleh Awang & Anor v. Low Han Leong & Anor [1982] 1 MLJ 82 ***(refd)***

Multar v. Lim Kim Chet & Anor [1982] 1 MLJ 184 ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
Ng Aik Kian & Anor v. Sia Loh Sia [1997] 2 CLJ Supp 218 ***(refd)***
Ng Ngat Siang v. Arab-Malaysian Finance Bhd & Anor [1988] 3 MLJ 319 ***(refd)***
Nicholas Arthur Nock v. Mohamed Ali Suleiman & Anor [1976] 1 MLJ 252 ***(refd)***
Ong Yam Chong & Anor v. Chan Wah [1962] MLJ 184 ***(refd)***
Philipps v. Philipps [1878] 4 QBD 127 ***(refd)***
Phuah Jee Suan v. Nila Vasu Pillai [1973] 1 MLJ 186 ***(refd)***
Re Robinson's Settlement, Gant v. Hobbs [1912] 1 Ch 717 ***(refd)***
Rosli Md Nor, simati & Ors v. TP Saffeer & Anor [1998] 4 CLJ 241 ***(refd)***
Rothmans of Pall Mall (M) Bhd v. Neo Kim Har & Anor [1988] 3 MLJ 478 ***(refd)***
Sam Wun Hoong v. Kader Ibramshah [1981] 1 MLJ 295 ***(refd)***
Shamsudin v. Yap Choh Teh & Anor [1969] 1 MLJ 26 ***(refd)***
Spedding v. Fitzpatrick [1888] 38 Ch D 413 ***(refd)***
Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu [1999] 3 CLJ 188 ***(refd)***
Thorp v. Holdsworth [1876] 3 Ch D 637 ***(refd)***
Thulia v. S [1973] Allahabad SC 501 ***(refd)***
Virendra v. Jagjiwan [1974] Allahabad 1957 ***(refd)***
Williamson v. Rover Cycle Co [1901] 2 IR 619 ***(refd)***
Yahya Mat & Anor v. Abdul Rahman Abu [1982] 1 MLJ 220 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 107
Evidence Act 1950, s. 114(g)
Rules of the Supreme Court 1957, O. 18 r. 8(1)
Rules of the High Court 1980, O. 18 r. 8(1)

Other source(s) referred to:
The Concise Oxford Dictionary, 9th edn

For the plaintiff - Hardeep Singh Mann; M/s NM Tiong & Co
For the defendants - Atikah Osman; M/s Mak, Ng, Shao & Kee

Reported by Raja Vishnu

JUDGMENT

Abdul Malik Ishak J:

Introduction

The learned sessions court judge in the person of Madam Komathy Suppiah ("trial court") gave judgment to the plaintiff and held that the first defendant as the servant or agent of the second defendant wholly liable for the motor vehicle accident that took place on 22 November 1994 at about 12.00 midnight at Jalan Stulang Laut, Johor Bahru, Johore. The trial court ordered the

defendants to pay the plaintiff the judgment sum of RM101,993.00 together with interest and costs. The breakdown of the judgment sum of RM101,993.00 as ordered by the trial court was in this manner:

(a) damages for pain and suffering together with loss of amenities were computed at RM70,000;

(b) loss of earnings at RM21,236 which was made up of:

(i) an agreed part time earnings at RM8,000 as reflected at p. 19 of the additional record of appeal in encl. 10; and

(ii) plaintiff's loss of earnings as a car salesman at RM13,236.

(c) agreed special damages at RM10,757.

At the material time, the plaintiff was driving a motor car bearing registration number JCY 8733 from Johor Bahru towards Jalan Pasir Pelangi whereas the first defendant was driving a motor car bearing registration number NY 315 in the opposite direction. It was a frontal collision and the collision was on the plaintiff's right of way. The statement of claim averred that there was an encroachment by the first defendant into the plaintiff's right of way and that must have been the cause of the accident.

Aggrieved by the decision of the trial court, the defendants appealed. The appeal was focussed on the issues of liability and quantum.

Liability

This was a motor vehicle accident that happened at 12.00 midnight. It was a straight road and that road was quite peculiar. According to sergeant Abdul Rahim (PW1) – the investigating officer, that road had three lanes as reflected in the sketch plan at p. 12 of the appeal record. One lane was marked as "A" to "B" that was heading towards Johor Bahru which was the direction which the first defendant was taking when he drove motor car NY 315. Then there were two other lanes "B" to "C" and "C" to "D" heading in the direction of Pasir Pelangi which direction was taken by the plaintiff that night when he drove motor car JCY 8733. A continuous white lane divided lane "A" to "B" with that of lane "B" to "C"; whereas lanes "B" to "C" and "C" to "D" were divided by broken white lines. Sergeant Abdul Rahim (PW1) explained that at point "F" as shown in the sketch plan was the glass fragments and its location was on the plaintiff's right of way. Glass fragments on the road would show either one of two things. Firstly, the point of impact of both vehicles at the time of the accident or, secondly, the resting place of the vehicles after the impact. In *Ng Aik Kian & Anor v. Sia Loh Sia* [1997] 2 CLJ Supp 218

at p. 224, I had occasion to say something about the value of glass fragments found on the road after a motor vehicle accident and this was what I had to say:

> It is now well known that the position of broken pieces of glass would show the point of impact or the ultimate resting place of the vehicle after impact. Past decisions have shown that if broken pieces of glass from the headlamp of a vehicle are found scattered at a spot then that point would be the point of impact for the simple reason that broken pieces of glass from the headlamp would normally fall at the point of impact. Abdoolcader J (as he then was) in *Yahaya bin Mat & Anor v. Abdul Rahman bin Abu* [1982] 1 MLJ 202 said, in the same vein, to the following effect:
>
> > The learned judge also laid great stress on the matter of the broken glass splinters that were found scattered on the first appellant's side of the road but in doing so he was referring to broken glass from the screen. The windshield of the taxi however was not broken but only its off-side headlamp was and this would make some considerable difference to the conclusion he reached on the importance of the position where the glass was found as pieces of glass from the broken headlamp would probably fall almost at the point of impact.
>
> On the same point, VC George (as he then was) in *Loh Chee Keong v. Syarikat Bee Huat Sdn Bhd & Anor* [1982] 2 MLJ 184 especially at p 185 said:
>
> > Now, the point marked F in the sketch plan is where the broken glass of the lamp of the motorcycle was found and was 2 feet from the left grass verge as one faces the direction of Jabor towards which the bus was travelling. Whatever DW1 has said about the point of impact, that point F is clearly where the impact between the bus and the motorcycle took place. If there are any doubts as to which of the two versions is the more probable I think that the point F significantly tilts the balance in favour of the bus driver's version. And particularly as the learned President came to the same conclusion there will be no interference by me of his finding of fact as to how the accident happened.

Continuing at the next page, I had this to say:

> But if the vehicles after collision do not stop immediately but proceed ahead and carry with it the glass fragments and eventually the vehicles stop at some distance away, then the point of impact cannot be gauged by merely relying on the spot where the glass fragments fall (*Mat Desa bin Salleh v. Ang Hock Lee & Anor* [1979] 1 MLJ 241).

Reverting back to the mainstream of the case, sergeant Abdul Rahim (PW1) testified that he did not take any measurement from point marked "F" to point marked "B" as shown in the sketch plan and he too emphasised that he did not take any measurement of the vehicles in question. Sergeant Abdul Rahim (PW1) did not take photographs of the scene but he did say that when he

arrived the two vehicles were still there. He advanced a reason for not taking the necessary photographs: it was raining at that time. In the same breath he said that the road was slippery. Nevertheless, he clarified that the road condition was good. The good sergeant also explained that both the vehicles were damaged at the front right portions. According to him, no one was charged by the police as a result of that road accident. He testified that he only had with him the police report lodged by the first defendant while the police report lodged by the plaintiff was referred to sergeant Sha'fee.

Under cross-examination, sergeant Abdul Rahim (PW1) testified that all the three lanes had equal measurements in terms of its width: each had a measurement of 3.4 metres in width. He too testified that the vehicles were facing one another. He then said that the damage to the plaintiff's vehicle was to its left.

Under cross-examination, sergeant Abdul Rahim (PW1) was asked to mark the front damage portions of both the vehicles as "X" and "Y" in relation to the sketch plan. It was an exercise that clearly showed that both the vehicles were damaged at its front right portions. He was quite truthful when he said that he did not record the details of the damage to both vehicles.

The plaintiff (PW2) took the stand. According to him, before the collision occurred, he was driving alone from Johor Bahru to Pasir Pelangi. He said that he stopped at the traffic light junction and the collision occurred while he was in the third gear passing the traffic light. He testified that he was in lane "C" to "D" as reflected in the sketch plan when the accident occurred. Under cross-examination, the plaintiff testified that there was only one lane after the traffic light junction while, under re-examination, the plaintiff said that the place where the collision occurred there was only one lane and that lane "C" to "D" was the road shoulder. He again emphasised that he was in lane "C" to "D" as per the sketch plan at the time of the accident. Finally, the plaintiff said that he did not understand the sketch plan prepared by sergeant Abdul Rahim (PW1). Now, Madam Atikah binti Osman, learned counsel for the defendants, was quite meticulous. She submitted with vigour and vitality and she criticised the evidence of the plaintiff. She pointed out that the plaintiff claimed that during the collision, the plaintiff was in lane "C" to "D" and that there was no vehicle on the plaintiff's right. But alas, so she submitted, the sketch plan showed otherwise. According to her, the sketch plan showed the plaintiff's motor car in a horizontal position with its whole body on lane "B" to "C" and its front part facing lane "C" to "D". At the same time, the plaintiff's motor car was also facing the front portion of motor car NY 315 that was driven by the first defendant. From this she surmised that if indeed the plaintiff was travelling towards Pasir Pelangi from Johor Bahru there was no explanation advanced by the plaintiff as to how his

motorcar was located in lane "B" to "C" cross-cutting the said lane and not at lane "C" to "D" as alleged by him. Flowing from this she stressed that the positions of the two vehicles as shown in the sketch plan were inconsistent with the evidence of the plaintiff particularly in regard to the direction of the plaintiff's travel and the lane in which the plaintiff was in during the said collision. She bluntly submitted that the evidence of the plaintiff contradicted the sketch plan and did not support one another. It must be borne in mind that there was evidence emanating from the plaintiff at p. 9 of the appeal record to show that the plaintiff was unconscious after that road accident and when he woke up he found himself warded at Sultanah Aminah Hospital, Johor Bahru. He was warded for two solid weeks. It was thus not surprising that under cross-examination the plaintiff categorically stated that he did not understand the sketch plan (see p. 12 of the appeal record). Be that as it may, the evidence of sergeant Abdul Rahim (PW1) – an independent witness, must be accepted as the gospel truth. The good sergeant testified that when he arrived at the scene both the vehicles were there and he forthwith caused the sketch plan and the key thereto to be prepared. Indeed the positions of the two vehicles after the road accident and the location of the glass fragments were cogent evidence that should not be overlooked.

It must be borne in mind that the court in *Yahya Mat & Anor v. Abdul Rahman bin Abu* [1982] 1 MLJ 220, observed that pieces of glass from a broken headlamp would fall at the point of impact. In the context of the present appeal, the presence of the glass fragments on the plaintiff's side of the road was a factor to be considered and reckoned with.

I will now narrate the evidence of the first defendant, Kamarulzaman bin Mohd Zin (DW1). He was 20 years of age at the time of the road accident and in his evidence he blamed the plaintiff for that road accident. Yet he had the audacity to say that the plaintiff was not the driver of motor car JCY 8733 and he stressed that the plaintiff was a mere passenger while the driver was another Malay person (see p. 16 of the additional appeal record). It was certainly a surprise move on the part of the first defendant and it ran counter to the statement of defence. Paragraph 5 of the statement of defence was worded in this way:

> Selanjutnya dan/atau dalam alternatifnya defendan-defendan menegaskan yang kemalangan tersebut disebabkan semata-mata dan/atau disumbangkan oleh kecuaian plaintif dalam pembawaan, penguasaan dan pengawalan motorkar tersebut.

and it clearly put the blame for the road accident onto the plaintiff. This was indeed a defence that was clearly and distinctly pleaded. The plaintiff's negligence or contributory negligence were particularised by the defendants. But the denial of the first defendant that the plaintiff was indeed the driver

of motor car JCY 8733 was not expressly pleaded. There was, to put it bluntly, no averment in the Statement of Defence that the plaintiff did not drive motor car JCY 8733 at the time of the road accident. It was a perilous course of action to take when the defendants failed to incorporate their defence in the statement of defence. Buckley LJ in *Re Robinson's Settlement, Gant v. Hobbs* [1912] 1 Ch 717, 728 once remarked in the context of O. 18 r. 8(1) of the Rules of the Supreme Court (equivalent to our own O. 18 r. 8(1) of the Rules of the High Court 1980) in these refined words:

> The effect of this rule is, for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to the Court to prove.

It would be prudent for the defendants to make it clear what line of defence they were adopting. All matters justifying or excusing the act complained of must be specifically and separately pleaded by the defendants (*AG v. Lord Mayor of Sheffield* [1912] 106 LT 367). No stones must be left unturned. All matters must be pleaded so that the opposite party will not be caught by surprise. A good draftsman will incorporate the relevant facts and marshall them together in the pleadings in a nice, logical fashion. To enable the trial to be conducted fairly, openly and without unnecessary surprises and also to cut costs, the pleadings must be drafted skillfully. Eminent judges before me have described good pleadings in many ways. By way of an illustration, it would be germane to reproduce the thoughts of some of these eminent judges:

(1) Lindley LJ in *Duke v. Wisden* [1897] 77 LT 67, 68 said that it would inform the other side of the nature of the case that they have to meet;

(2) Cotton LJ in *Spedding v. Fitzpatrick* [1888] 38 Ch D 413 remarked that it would prevent the other side from being caught by surprise;

(3) Jessel MR in *Thorp v. Holdsworth* [1876] 3 Ch D 637, 639 observed that it would enable the other side to know the kind of evidence that they have to prepare for the trial;

(4) Vaughan Williams LJ in *Milbank v. Milbank* [1900] 1 Ch. 376, 385 was of the view that it would identify the issues to be tried; and

(5) Brett LJ in *Philipps v. Philipps* [1878] 4 QBD 127, 138 succinctly said that it would tie the hands of the parties so that they would not go astray.

So much for the law. It is now time to revert back to the evidence that was led before the trial court.

When shown the sketch plan, the first defendant categorically stated that that was not a depiction of the place of the road accident. Yet he had the audacity to say that he was travelling on lane "A" to "B" in relation to the sketch

plan and that the road accident happened on his side of the road and not as portrayed in the sketch plan. He too disputed the positions of the motor vehicles as depicted in the sketch plan. The first defendant then drew from what he perceived to be the correct positions of the motor vehicles in the context of the sketch plan by marking the position of motorcar NY 315 in lane "A" to "B" while the position of the plaintiff's motor car JCY 8733 was marked in lane "B" to "C". All these markings by the first defendant were made on the sketch plan prepared by sergeant Abdul Rahim (PW1). It was the stand of the first defendant that both the vehicles collided into one another at the centre of the road at "B" – the continuous white line that divided the two portions of the road apart. The first defendant continued with his narration of the road accident. He said that as he was nearing a traffic light he saw two motor cars coming from the opposite direction. He saw the plaintiff overtook a vehicle in front in a haphazard manner by meandering to the left and then proceeded straight in his direction. He said that at that time there was no vehicle ahead of him and the traffic light had just turned yellow. He reduced his speed to 30 k.m.j.; it was drizzling and the traffic was light. After the road accident, he alighted from the motor car and proceeded straight to the plaintiff's motor car and he saw two male Malays and the plaintiff in a state of unconsciousness. He said that he was also injured and that there were two passengers with him at the material time.

Under cross-examination, the first defendant was shown the sketch plan that was prepared by sergeant Abdul Rahim (PW1), and he stated that the positions of the motor vehicles had been altered. What was reflected in the sketch plan was not correct. He said that he was not at the scene when the police arrived. According to him, his friends were also not at the scene because they had proceeded to the hospital. He said that after the accident he did not alter nor change the positions of both the vehicles. He categorically stated that the passengers in his motorcar did not lodge any police report and that they were slightly injured and had proceeded to the hospital for treatment. According to him the road accident occurred about 50 metres from the traffic light and there was no road divider at the scene of the road accident. He denied that he did not know where the road accident had occurred. He said that he was taken to the hospital by a male Indian with a Chinese girl friend and that male Indian was driving a Honda Civic. He also said that he saw the plaintiff in the hospital after the road accident. After the road accident and at the scene thereof, the first defendant alighted from the motor car NY 315 but he did not assist the plaintiff. There were other people converging at the scene of the road accident. He did not notice whether there was a motor car behind him after the road accident. He testified that he had a driving licence for the last five years and that he was about 20 years of age at the time of the road accident. It is pertinent to note that when the first defendant took the stand he was 24 years of age.

The first defendant was then shown the police report which he had lodged on 25 November 1994 at Johor Bahru traffic police station which police report was worded as follows (see p. 11 of the appeal record):

> Pada 22.11.94 lebih kurang 2400hr saya pemandu m/kar NY 315 dari Tebrau hendak ke Bukit Cagar. Apabila tiba di Jln. Stulang Darat tiba-tiba sebuah m/kar no JCY 8733 tidak dapat mengawal kenderaannya dan terus melanggar m/kar saya di bahagian kanan.
>
> Kerosakan m/kar saya rosak teruk disebelah kanan dan lain-lain kerosakan belum diketahui lagi.
>
> Saya datang balai buat report.
>
> Sekian repot saya.

and he was then cross-examined on his police report. He said that he did not state about the passengers in the motor car in which he was driving because he merely answered the question that was posed to him by the police. He however agreed that in his police report he did not state that the plaintiff carried two passengers. He too agreed that in his police report he did not state that the plaintiff was overtaking another motor car. Again he emphasized that he merely answered the question posed to him by the police. He disagreed that he did not state all those particulars because it did not happen.

He then sought to explain that he knew those passengers in the motor car in which he was driving because they were his friends. There was no re-examination of the first defendant.

In sharp contrast, the plaintiff in his police report alluded to the salient details that would certainly put the plaintiff in good stead. The plaintiff lodged the police report on 12 December 1994 even though the motor vehicle accident occurred on 22 November 1994. There was indeed a delay in lodging that police report and that delay can easily be explained. The plaintiff was rendered unconscious due to the road accident and he was hospitalised for two solid weeks. The police report by the plaintiff was worded in this way (see p. 10 of the appeal record):

> Pada jam L/kurang 12.00 mlm 22/11/94 semasa saya memandu m/car JCY 8733 di Jln. Stulang Darat, menghala ke Pasir Pelangi, sampai di kawasan Stulang Darat, sebuah m/car no. tak ingat yang datang dari arah hadapan memotong sebuah kenderaan lain dan terus memakan jalan saya dan melanggar m/car saya. Saya mengalami kecederaan mata saya buta sebelah dan muka saya mengalami luka parah.
>
> Kerosakan m/car, bahagian depan. Rosak teruk.

and in that police report, the plaintiff gave a running commentary of what had transpired on that fateful midnight. He said that on that fateful midnight while he was driving motor car JCY 8733 along Jalan Stulang Darat towards the direction of Pasir Pelangi and upon arrival at Jalan Stulang Darat, a motor car whose registration number he could not remember came from the opposite direction and overtook a vehicle and thereafter encroached and collided into his motor car. He sustained injuries; his eye became blind and his face was seriously injured. His motor car was badly damaged particularly at its front portion.

It is a salutary rule to remember that a police report is "a document made for the purpose of the public making use of it" (see s. 107 of the Criminal Procedure Code (FMS) Cap 6) and every care must be exercised when one lodges a police report. There were omissions on the part of the first defendant when he lodged the police report in regard to the motor vehicle accident in question. The omissions were in regard to material facts, *viz*:

(1) failure to state that he carried two passengers in the motor car NY 315;

(2) failure to state that the plaintiff carried two passengers in motor car JCY 8733;

(3) failure to state that motor car JCY 8733 was driven by someone else other than the plaintiff; and

(4) failure to state that he saw the plaintiff was overtaking a vehicle and was driving in a haphazard manner by meandering to the left and then straight onto motor car NY 315.

and such omissions can best be described as fatal. Winslow J in *Nicholas Arthur Nock v. Mohamed Ali Suleiman & Anor* [1976] 1 MLJ 252, CA aptly said:

> His report does not help him at all. There never was any question whatsoever of oncoming traffic in that half of Guillemard Road and in that report he did not say one word about the motorcyclist overtaking him or what their respective positions on that road were.

In 1977, the late Arulanandom J echoed the same sentiments in the case of *Abdul Mokhti Haji Ahmad v. Idris Ibrahim* [1977] 2 MLJ 85 when his Lordship said:

> In considering whether the plaintiff's version is the correct version, one has to take into consideration a few factors. The pillion rider Shahidi bin Yahya made a report immediately after the accident and in that report there was no mention of any car cutting across the path of the plaintiff and stopping. All

he says in his report is: 'When we arrived at Simpang Chempa Lane, my friend collided into the rear of a motor taxi. I fell.' In the report of the plaintiff which was made about one month after the accident he says:

> When I arrived near Mengkuang Road, a motor taxi came from my rear and overtook my motorcycle and suddenly stopped in front of me. I applied my brakes but collided into the rear and I fell down unconscious.

Section 107 of the Criminal Procedure Code (FMS) Cap 6 enacts as follows:

> (i) Every information relating to the commission of an offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant.
>
> (ii) Every such information shall be entered in a book to be kept by such officer, who shall append to such entry the date and hour on which such information was given, and whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it.

and the police report lodged by the first defendant can best be described as an "information relating to the commission of an offence" and according to the then Federal Court in the case of *MA Clyde v. Wong Ah Mei & Anor* [1970] 2 MLJ 183:

> ... if a first information report contains an admission which is relevant to a claim in a civil action against him, it is admissible in evidence.

I am acutely aware that the "first information report" cannot be described "as a sure touchstone by which the complainant's credit may invariably be impeached" (*Herchun Singh & Ors v. PP* [1969] 2 MLJ 209, 211), but when viewed in the context of a civil proceeding, the importance of a first information report can never be doubted. In a running down case, precision in lodging a police report will go a long way in advancing one's case in a court of law. In *Haron v. Macaulay* [1969] 1 MLJ 169 FC, the failure of the appellant to mention in his police report the fact that he had given a warning was considered adversely against him. Likewise, I must construe the failure to mention those material omissions by the first defendant in his police report adversely against him.

Incidentally, there was also a failure to cross-examine the plaintiff in regard to the overtaking that was said to be done by the plaintiff which resulted in the frontal collision. It was a mere speculation on the part of the first defendant to submit that the plaintiff's act of overtaking other vehicles was the root cause of the accident. Two things must be highlighted here. Firstly, if that was indeed the defence of the first defendant, that very defence was no where incorporated in the statement of defence. Secondly, that very defence was not put to the plaintiff when the latter was in the witness box. At any rate, it would be an exercise in futility to put that defence to the plaintiff as that very defence was not incorporated in the statement of defence at all.

The need to put across the defence story in cross-examination can never be over-emphasised. Litigation lawyers must now be conscious and must know the value of putting across one's story while cross-examining a witness. The law journals are replete with authorities on this point. Suffice for this exercise that I refer to three prominent authorities. In *Shamsudin v. Yap Choh Teh & Anor* [1969] 1 MLJ 26 at 28, the late Gill J said:

> As was pointed out by counsel for the plaintiff, the plaintiff and his witness were not cross-examined on the question of the explosion after the all clear. Their story on that point in fact was not challenged. All that was put to the plaintiff was that he did not take the right type of cover for his own safety.

In *Multar v. Lim Kim Chet & Anor* [1982] 1 MLJ 184 at 185 FC, the late Syed Othman FJ succinctly said:

> As far as we can see, the appellant's evidence is consistent with his report and the sketch plan. His evidence as to how the accident occurred was not challenged.

Way back in 1893 in the case of *Browne v. Dunn* [1893] 6 R 67, Lord Chancellor Herschell at p. 70 of the report observed in trenchant terms:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

The appropriate time to challenge the evidence of a witness is when that witness is in the witness box and it is at that point of time that it is made plain to him, under cross-examination, that his evidence is not accepted as the gospel truth.

Simply put, the version of the plaintiff was that he was driving motor car JCY 8733 from Johor Bahru to Jalan Pasir Pelangi when the first defendant while driving motor car NY 315 encroached into the plaintiff's path of travel which resulted in the road accident. The collision took place in the plaintiff's path of travel that rendered the plaintiff unconscious.

On the other end of the scale, the defendants through the first defendant disputed the point of impact. It was the first defendant's version that when the plaintiff was overtaking another vehicle in a haphazard manner by meandering to the left and when the plaintiff tried to manoeuvre motor car JCY 8733 to the right lane, the plaintiff lost control of the said motor car and collided into the motor car NY 315 driven by the first defendant in the centre of the road at "B" – the continuous white line.

Madam Atikah binti Osman for the defendants took up the cudgel and argued that the trial court failed to take into consideration the fact that the sketch plan as prepared by sergeant Abdul Rahim (PW1) was totally inconsistent with the evidence of not only the plaintiff but also the first defendant as well. It was her submission that since the sketch plan was disputed the trial court had erred both in fact and in law when the trial court relied solely on the sketch plan and the key thereto in coming to the conclusion that by virtue of the presence of the glass fragments the collision had occurred on the plaintiff's side of the road – namely, the lawful path of the plaintiff. I have somewhere in this judgment relied on the judgment of Syed Othman FJ in *Multar v. Lim Kim Chet & Anor (supra)* in order to highlight the importance of a sketch plan. It must be recalled that the plaintiff did not challenge the sketch plan but he merely said that he could not understand the sketch plan (see p. 12 of the additional appeal record) and when Madam Atikah binti Osman submitted that the plaintiff challenged the sketch plan, it was with respect, a submission that ought not to have been made. At p. 9 of the additional appeal record, the plaintiff when shown the sketch plan was able to categorically say that he was proceeding along lane "C" to "D" which when translated meant that the plaintiff was travelling on his lawful path of the road and not encroaching into the first defendant's right of way as the first defendant attempted to portray. At any rate, the then Federal Court in the case of *Mohamed Salleh bin Awang & Anor v. Low Han Leong & Anor* [1982] 1 MLJ 82 made it abundantly clear that when both parties gave an unclear account of how the accident had happened, the court was certainly justified in relying on the sketch plan and from it the court was entitled to draw the necessary inferences as to the liability of each party. The trial court was certainly justified to rely on the sketch plan in order to ascertain the liability of the wrong doer. In my judgment, the sketch plan established beyond doubt that the collision occurred on the plaintiff's lawful path for two basic reasons: that glass fragments and the positions of both vehicles were all found on the plaintiff's side of the road (*Lim Gaw Teong & Anor v. Daniel & Anor* [1968] 1 MLJ 277).

Under cross-examination, the first defendant said:

(1) that in relation to the sketch plan, the positions of the motor vehicles had been altered; and

(2) that after the accident, he did not alter nor change the positions of both the vehicles.

and this was certainly an attempt to undermine the evidence of sergeant Abdul Rahim (PW1) – the maker of the sketch plan and the key thereto. But these points were not put to the said sergeant under cross-examination. It was wishful thinking on the part of the first defendant to assert those points when he was being cross-examined and in the context of the whole trial that was the first time that these two factual points surfaced. It was, to say the least, an attempt at embellishment on the part of the first defendant. Fortunately, the trial court was able to see the wood from the tree and was able to adjudicate the matter with some measure of certainty. It was a display of judicial talent at its best.

Indeed, if the first defendant did not alter nor change the positions of both the vehicles after the accident then it stands to reason that both the vehicles were left undisturbed and it was therefore untrue when the first defendant alleged that the motor vehicles had been altered. The plaintiff and his two passengers could not have moved or altered the positions of both the vehicles after the accident because they were, according to the first defendant, rendered unconscious upon impact. It must be recalled that sergeant Abdul Rahim (PW1) testified that when he arrived at the scene both the vehicles were there and he forthwith caused a sketch plan to be drawn. There was also no evidence that members of the public had moved both the vehicles immediately after the road accident and before the arrival of sergeant Abdul Rahim (PW1) at the scene. Therefore, the only reasonable conclusion to arrive at would be that the said sergeant drew the sketch plan based on what he saw upon arrival at the scene. And what was depicted by the said sergeant in the sketch plan would definitely put the issue of liability at the door of the first defendant.

The trial court had rightly and correctly viewed the conflicting testimony against the backdrop of independent evidence. The approach adopted by the trial court was in accord with the case of *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu* [1999] 3 CLJ 188 at p. 192, where the court there aptly said:

> There were two versions of the accident. One version came from the respondent plaintiff himself while the other version was that of the first appellant defendant. The trial court fell in error when it approached the case solely on the basis of deciding which story was to be believed. When confronted with two conflicting versions, the duty of the trial court was to consider which version was inherently probable or improbable. The trial court should have been more meticulous and considered other probable versions provided they were within the scope and ambit of the pleadings and supportable by admissible evidence including the neutral ones. This approach provides a wide leverage for the trial court to manoeuvre bearing in mind, always, the testimony of the credible witnesses. Spenser Wilkinson J castigated the Magistrate in *Koay Teik Choo*

& Ors v. Reg [1956] 22 MLJ 52, for approaching the case upon the basis of which of the two conflicting stories he should believe. His Lordship remarked at p 53 of the report that:

> One of the dangers of this approach is that it leaves entirely out of account the possibility (which in my opinion existed in a very high degree in the present case) that what has really been proved is something between the two stories.

In *Noorianti bt Zainol Abidin (f) & 8 Ors v. Tang Lei Nge & Tang Lye Chang* [1990] 1 CLJ 943, Lim Beng Choon J had occasion to say that the trial judge should not approach the case on the basis of deciding which story out of the conflicting stories that should be believed, but rather to consider which version was inherently probable or improbable. All things being equal, it is trite law that if the version of one of the parties is inherently probable, then the judge has no choice but to accept that version forthwith (*Chua Chong Cher v. Teo Lang Keow & Ors* [1970] 2 MLJ 27).

The trial court too had rightly relied on the sketch plan as drawn by sergeant Abdul Rahim (PW1) and this approach should not be faulted at all. In *Ng Aik Kian & Anor v. Sia Loh Sia (supra)* particularly at p. 227 of the report, I had this to say:

> It is the law that where the drivers and the witnesses on each side tell conflicting and divergent stories, the photographs, plans, measurements of the scene of the accident and the nature of the damage to each vehicle must surely be the guiding force – the reliable guide to rely upon (*Yahaya bin Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117 FC; *Mohamed Salleh bin Awang & Anor v. Low Han Leong & Anor* [1982] 1 MLJ 82 FC; *Murugan v. Lew Chu Cheong* [1980] 2 MLJ 139 and *Lee Ewe Teik v. Ariffin bin Hussain* [1990] 2 CLJ 191).

This was a case where the plaintiff succeeded in showing that the first defendant "rather than himself was negligent". This was a case where the first defendant had the audacity to take the stand and made unfounded allegations without supportive proof thereof. The allegations by the first defendant that the road accident occurred at the centre of the road at point "B" of the sketch plan, that the plaintiff was not the driver of motor car JCY 8733 at the material time, that both the motor vehicles were moved after the road accident and that the sketch plan was not reflective of how the accident had occurred were not put to either the plaintiff or sergeant Abdul Rahim (PW1). The plaintiff's version of how the road accident had happened tallied with his police report whereas the first defendant's police report did not accord favourably with the first defendant's version. In *Ng Aik Kian & Anor v. Sia Loh Sia (supra)* at p. 228 thereof, I made reference to the case of *Mohamed Abdullah v. Chah Hea Seng* [1980] 2 MLJ 282 and this was what I said:

> To resolve these doubts, I am reminded of the decision of Wan Suleiman FJ in the case of *Mohamed bin Abdullah v. Chah Hea Seng* [1980] 2 MLJ 282 at p 283 right hand column at G where his Lordship said:

> We are of the view that the principles enunciated in *Baker v. Market Harborough Industrial Cooperative Society Ltd* [1953] 1 WLR 1472 followed by our Court of Appeal in *Ong Yam Chong & Anor v. Chan Wah* [1962] MLJ 184 that where there is a collision between two vehicles travelling in opposite directions then in the absence of special circumstances there is a *prima facie* presumption that both drivers are negligent and the onus falls on each of them to show that the other driver rather than himself was negligent, is applicable in this instance.

and in the present appeal, there were special circumstances to show that the first defendant was negligent when he drove motor car NY 315 on that fateful midnight trip. Since there were no cross-examinations of the plaintiff and sergeant Abdul Rahim (PW1) as to the material aspects of the defendants' case, it was too late in the day for the defendants to agitate those material aspects at the appellate stage. On this point, I had occasion to say in the case of Wakil diri bagi harta pusaka atas *Rosli Md Nor, simati & Ors v. TP Saffeer & Anor* [1998] 4 CLJ 241 at pp. 244, 245:

> The learned counsel for the first and second appellants never put nor suggested to the material witness, namely, KP Mohammed Kunhi s/o Abdul Kadir (SP1) during cross-examination, that the salary vouchers were fabricated. Now, having miserably failed to put their case to this material witness during cross-examination, Miss Lai Kuan Jean cannot agitate this point at the appellate stage. I am fortified in my view by the joint decisions of Gopal Sri Ram and Mahadev Shankar JJCA in the case of *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 3 AMR 3506 where at p. 3513-3514 of the judgment their Lordships said:
>
> > The main thrust of the defendants' case was that the plaintiff had requested the first respondent's permission to climb the tree which the first respondent refused. The plaintiff's case, on the other hand, was that he had been instructed by the first defendant to make the climb. But nowhere in the defence was it alleged that there was such a request as alleged in the evidence. Further and more importantly, it was never put to the plaintiff under cross-examination that such a request had come from him. The trial judge ought to have taken this failure into account when he came to assess the evidence. But nowhere in his judgment is there any indication that he did so. In *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Anor appeal* [1995] 3 AMR 2375 at p 2405, this court, when applying the rule in *Browne v. Dunn* [1893] 6 R 67 said:
> >
> > > It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

> We are satisfied that if the learned Judge adopted the correct approach to the evaluation of evidence, we have no doubt that he would have found for the plaintiff.

It must be recalled that the first defendant alleged that there were two other passengers in motor car NY315 at the time of the accident yet the first defendant failed to call these two material witnesses to corroborate his version (*Munusamy v. PP* [1987] 1 MLJ 492, 494 SC). I am asked to raise the presumption under s. 114(g) of the Evidence Act 1950 against the defendants for their failure to call the two material witnesses (*Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33 (SC); *Ng Ngat Siang v. Arab-Malaysian Finance Bhd and Anor* [1988] 3 MLJ 319; and *Rothmans of Pall Mall (M) Bhd v. Neo Kim Har and Anor* [1988] 3 MLJ 478) and I have no hesitation in doing so. Section 114(g) of the Evidence Act 1950 enacts as follows:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case
>
> ILLUSTRATIONS
>
> The court may presume –
>
> …
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

and this rule derived its origin from the *maxim omnia praesumuntur contra spoliatorem*. Wrongful withholding of evidence would trigger the presumption to the disadvantage of the withholder (*Williamson v. Rover Cycle Co* [1901] 2 IR 619). But it must be emphasised that adverse inference can only be drawn if there is withholding of evidence which evidence if produced would be favourable to the person who withholds it. Put in another way, the evidence is held back because it would be unfavourable. Indeed if the two passengers in motor car NY 315 were present at the time of the accident as alleged by the first defendant, they would certainly have knowledge of the facts and should subject themselves to cross-examination. Their failure to take the stand, should be a good ground to discredit the defendants' case (*Thulia v. S* [1973] Allahabad SC 501; and *Virendra v. Jagjiwan* [1974] Allahabad 1957). It was legitimate for me to draw an adverse inference against the defendants in the circumstances of the present case. It was a deliberate exercise on the part of the defendants in refusing to call the two passengers as material witnesses. This was my judgment, and I so hold accordingly.

Was there contributory negligence on the part of the plaintiff? In *Tabarani bin Mohd Arsad & Anor v. Chan Tenn Yeu* [1999] 3 CLJ 188 at p. 205, the court there explained the law on contributory negligence in these words:

> On contributory negligence and to establish contributory negligence it is not necessary to show that the negligence of the plaintiff constituted a breach of duty towards the defendant; it is sufficient to show that a lack of reasonable care for the plaintiff's own safety was the cause of the injury (*Davies v. Swan Motor Co (Swansea) LD James, Third Party* [1949] 2 KB 291 CA).

The question to pose would be whether there was "a lack of reasonable care for the plaintiff's own safety" that was instrumental to the injuries sustained by him? The answer would be in the negative. From the available evidence, the plaintiff was travelling on his lawful path when the first defendant encroached and collided into the motor car driven by the plaintiff. The collision was on the lawful path of the plaintiff and it can be inferred that the plaintiff had taken reasonable care for his own personal safety. Even though the trial court did not specifically allude to the issue of contributory negligence, yet from the tenor of the written judgment of the trial court (see p. 24 to p. 26 of the additional appeal record), it can be surmised that the trial court addressed its mind on the matter.

This was not the case where the plaintiff was "hugging" the centre of the road while driving motor car JCY 8733. Ong J once commented in *Ong Yam Chong & Anor v. Chan Wah* [1962] MLJ 184 at p. 185:

> Like many others of his ilk he appears to have thought that he owed no duty of care to other road users so long as his vehicle kept to its own half of the road, however closely he might be hugging its centre line.

This was in fact the case of the plaintiff keeping to his left edge of the road when the first defendant encroached on its path. There was therefore no contributory negligence at all on the part of the plaintiff. This was my judgment and I so hold accordingly.

I am asked by Madam Atikah binti Osman to apportion the blame equally among the parties. Mr. Hardeep Singh Mann, learned counsel for the plaintiff, argued to the contrary and it was his submission that the first defendant was wholly to blame for the road accident. I refused to accede to her request and I agreed with the submission of Mr. Hardeep Singh Mann. The available evidence showed that the first defendant was the sole author of the road accident. This case was unlike that of *Abdul Rahman v. Soon Ah Hai* [1978] 2 MLJ 31, FC. That was the case where the Federal Court held that both the parties were equally to blame because the sketch plan showed that the impact was very near to the centre of the road. Here, the sketch plan drawn by sergeant Abdul Rahim (PW1) showed that the collision occurred on the plaintiff's left side of the road.

For the reasons adumbrated above, I hold and it was part and parcel of my judgment that the first defendant was wholly blameworthy for the road accident. The brut of negligence should be shouldered by the defendants.

Quantum

Pain and suffering and loss of amenities

In his police report, the plaintiff asserted that as a result of the road accident his eye became blind and his face was seriously injured. There was also evidence that the plaintiff became unconscious at the time of the road accident and he regained consciousness twelve hours after admission to the Sultanah Aminah General Hospital at Johor Bahru. Dr. Hooi Siew Tong from the Sultanah Aminah General Hospital prepared a medical report for the plaintiff dated 11 March 1997 as seen in the appeal record and his medical report was quite thorough and it was worded as follows:

> Name: Abd. Kadir bin Mohamad
>
> NRIC: 8172205
>
> This gentleman returned for assessment on 21/02/1997, with a view to obtaining a medical report on the result of injuries allegedly suffered in a road traffic accident on 22/11/1994.
>
> The following findings were noted:
>
> 1. INJURY TO RIGHT EYE (NOW BLIND)
>
> The severe penetrating injury with loss of ocular contents sustained during the alleged accident and which was evident when he first presented to the hospital on 23/11/1994, has resulted in a blind unsightly disorganised right eye. The intraocular pressure is low indicating severe dyfunction. The vision is hand movement only; he is legally blind in his right eye, and no recovery of useful vision can be expected. His left eye was not affected in the accident, and sees 6/6 visual acuity and is normal to examination.
>
> 2. RIGHT UPPER LID LACERATION
>
> He sustained a 3cm-long laceration to the front surface of his right upper lid during the alleged accident, which does not involve the lid margin. The scar is barely visible now, and lid function is normal.
>
> 3. FACIAL LACERATIONS
>
> He sustained numerous small lacerations on his forehead during the alleged accident, the purported cause of which were glass pieces from a shattered windscreen impacting on his forehead. There are numerous small scars on his forehead, the largest of which is 2 cm long, leading to some cosmetic disfigurement.

The most obvious facial scar is one measuring 7 cm-long, extending vertically downwards from his right temple, over his right zygoma and terminating midway down his right cheek. This scar is very obvious, and disfigurement is similarly obvious.

4. FRACTURED RIGHT ZYGOMA

This bone was noted to have been fractured on x-rays taken on admission to hospital in 1994. Apart from the scar on the cheek above the said zygomatic bone, this fracture has given the subject of this report no functional problems, and can be assumed to have healed without sequelae.

There were two eye specialist reports on the plaintiff. The first was from Klinik Pakar Mata Anna from Johor Bahru which report was dated 5 December 1996 and it was worded as follows :

TO WHOM IT MAY CONCERN

RE: ABD. KADIR BIN MOHAMED

IC: 8172205 AGE: 40 YEARS

Dear Sir,

This is to certify that above named is blind in the (R) eye. (R) vision is only perception to light. (L) vision is 6/6 – normal.

PAST HISTORY – History of motor vehicle accident in Nov 1994. Admitted to Hospital Sultanah Aminah for multiple facial and lid lacerations, fracture of (R) zygoma and (R) corneal laceration. Toilet and suture of (R) corneal laceration was done. In June 1995 patient had (R) eye operated for cataract in Singapore.

I saw the patient in SEPT 1996. (R) cornea hazy with decompensated features and vascularisation from perifery. Vague view of iris seen temporily with vascularisation. No view of pupil seen. The corneal epitahelium is unhealthy with oedma and bleas, which breaks down often giving rise to pain and redness in the (R) eye. Patient is being treated with antibiotic drops and ocular lubricant to prevent corneal epithelium breaking down.

The prognosis of (R) eye is poor, in spite of any surgery done in the future.

The second was from Klinik Mata Yow Sdn Bhd from Johor Bahru and this report was dated 8 January 1997 and it was worded in this manner:

Medical report on Abd. Kadir bin Mohamad, I.C. No. 8172205.

The above patient was seen by me today for the purpose of a specialist medical report arising from a MVA on 25.11.1994.

The left eye is normal with vision of 6/6 and reads N5.

The right vision is only perception (to) light, with right cornea showing total opacification and neovascularisation (enclosed video picture). There is peripheral anterior synechiae of iris from 4 to 12 o'clock position. The eye is aphakic with no view of right fundus. Intraocular pressure was only 4 mmHG.

He has suffered total (100%) loss of useful vision on his right eye. The damage is permanent with no possibility of recovery taking into account today's medical expertise.

The plaintiff testified that he went to Singapore for an eye operation to enable him to open his eye lid. For this exercise, he spent $S7,000 to $S8,000 and his father bore the expenses. There are receipts from Tahir's Eye Surgery of East Shore Hospital Medical Centre in Singapore. At Mount Alvernia Hospital in Singapore, the plaintiff was duly treated and he incurred the following expenses in Singapore dollars:

X'RAY	33.00	
ECG	33.00	
PHARMACY	26.50	
OT DRUGS	361.80	
MISCELLANEOUS	13.00	
OPERATING THEATRE	121.00	
SURGICAL GAS & DRUGS	60.00	
ICU PROCEDURE/SUPPLIES	33.00	
OPD RECOVERY ROOM	11.00	
OT MED/SURG SUPPLIES	232.00	
OPD FACILITIES	11.00	
MED/SURG. SUPPLIES	11.00	
		947.00
ADD GST @ 3%		28.41
AMOUNT (INCLUSIVE OF GST)		975.41
SPECIALIST'S FEE	350.00	

Back in Malaysia, the plaintiff went to Kuala Lumpur and had treatment with Pusat Pakar Mata Shukri & Hardeep (see p. 20 of the appeal record). In short, the plaintiff went at great length to seek medical treatment for his right eye. It was a futile exercise. He is destined to be blind in his right eye.

The plaintiff's right eye is now totally blind and the facial injuries which he sustained must have been excruciating, to say the least. According to Dr. Hooi Siew Tong, the blindness to the plaintiff's right eye was "unsightly disorganised". Dr. Hooi Siew Tong further elaborated on the scars which the plaintiff sustained and he said that:

(1) there were numerous small scars on the plaintiff's forehead, the largest being 2 cm long leading to some cosmetic disfigurement.

(2) there was an obvious facial scar measuring 7 cm long which extended vertically downwards from his right temple, over the plaintiff's right zygoma and terminated midway down the plaintiff's right cheek and this scar was said to be obvious and disfigurement was also similarly obvious.

(3) there was a 3 cm long laceration to the front surface of the plaintiff's right upper lid which did not involve the lid margin and that scar barely visible now and the lid function back to normal.

(4) there was a fractured right zygoma which was assumed to have healed.

Before the trial court, learned counsel for the plaintiff suggested a sum of RM60,000 for the blindness to the right eye and RM5,000 for the lacerations that left scars on the plaintiff's face. The learned counsel for the defendants too suggested to the trial court a sum of RM75,000.00 for the right eye blindness and a sum of RM10,000 for the lacerations that left scars to the plaintiff's face. The trial court awarded a sum of RM70,000 for these two injuries and the question of utmost importance was whether I should disturb the award that the trial court had ordered under this head.

The courts in the past have ordered a one lump sum award under this head. It is more of a practice than anything else. But Syed Agil Barakbah J (as he then was) in *Abdul Hamid v. Ooi Teik Ean & Anor* [1979] 1 MLJ 244 was quite bold when his Lordship awarded damages to a 69 year old claimant the sum of RM10,000 for pain and suffering and RM3,000 for loss of amenities. In *Abdul Rahman Abdul Karim v. Abdul Wahab Abdul Hamid* [1996] 2 CLJ 455, the defendant – a traditional eye healer, performed two operations on the plaintiff's right eye using the "couching" method which resulted in loss of vision to the plaintiff's right eye and I awarded a sum of RM60,000 to the plaintiff which sum was too low for comfort and I regretted awarding that sum until today. It was far too low. Judges too make mistakes and I must be more careful in awarding an appropriate quantum for loss of an eye in the near future. At p. 469 of the report, this was what I had said in that case:

> On general damages, two authorities in regard to blindness should be referred. The first would be the case of *Low You Choy & Anor v. Chan Mun Kit & Anor* [1992] 3 CLJ 1550 where blindness to the left eye attracted a sum of RM50,000. The second is the case of *Toh Ming Jee v. Lau Yiik Ung* (Civil Suit No 198-1979 High Court, Sibu) (unreported) where for loss of sight to the right eye the court awarded RM75,000. In these cases, the claimants had another eye left to see the world with, so to speak. Here, the defendant knew that when he treated the right eye of the plaintiff, the plaintiff's left eye was already blind. The loss of sight to the right eye of the plaintiff rendered him

totally blind and for this reason a sum of RM60,000 was awarded to him. On reflection, I thought that the figure was on the lower scale bearing in mind the peculiar circumstances of this case.

Fortunately, the present plaintiff still had a good left eye to see this beautiful world with. According to Dr. Hooi Siew Tong, the plaintiff's left eye "sees 6/6 visual acuity and is normal to examination." After due deliberation, I confirmed the award of RM70,000 which the trial court awarded the plaintiff under this head after taking into account that an award should keep up with the times (*Phuah Jee Suan v. Nila Vasu Pillai* [1973] 1 MLJ 186 at p. 188, CA). Again, on reflection, I felt that the figure was still too low. *The Concise Oxford Dictionary*, 9th edn, defines "blind" as "lacking the power of sight". Without sight, it would be a dark world to live in and the quantum must necessarily be on the upper scale. Being blind is worse than being defamed.

Loss Of Earnings

According to Mohamed Azmi J (as he then was) while writing for the then Federal Court in *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 MLJ 295 F.C. that loss of earnings form part and parcel of the general damages which need not be pleaded. But, of course, the court will only allow damages to be awarded under this head subject to evidence being led in open court. The plaintiff claimed for loss of earnings as a part time shop assistant and as a car salesman. Since the parties agreed that the part time earnings as a part time shop assistant should be computed at RM8,000 as reflected at page 19 of the additional record of appeal, I would not dwell on it and I would affirm it accordingly.

I would now proceed to examine the plaintiff's claim for loss of earnings as a car salesman. The plaintiff testified that as a car salesman he earned between RM1,500 and RM2,000 per month. The plaintiff's ex-employer by the name of Mohd Yusof bin Atan took the stand and he corroborated the evidence of the plaintiff. The salary vouchers too were tendered. The plaintiff also tendered his income tax Borang J form for the year 1994 which showed that his income for 1993 was RM18,000 and calculation wise this turns out to be RM1,500 per month. The trial court using the multiplicand of RM1,103 per month for a duration of one year, awarded the plaintiff for loss of earnings as a car salesman at RM13,236 and I wholeheartedly agree with this method of computation and I affirmed the award accordingly.

The plaintiff in proving the loss of earnings as a car salesman followed the advice of the Federal Court in the case of *Guan Soon Tin Mining Co. v. Wong Fook Kum* [1969] 1 MLJ 99, 100, 103 by tendering the relevant receipts. This was a good move that should be applauded.

a

Special Damages

It was pleaded at RM18,778.06 since it was essential to plead special damages (*Sam Wun Hoong v. Kader Ibramshah (supra)*). It would be appropriate to reproduce the apt words of Mohamed Azmi J (as he then was) who wrote the judgment of the then Federal Court in the case of *Sam Wun Hoong v. Kader Ibramshah (supra)*) and in that case his Lordship had this to say at p. 297 of the report:

b

> In an action for personal injuries, there are two classes of damages which have to be considered – special damage which has to be specially pleaded and general damage which need not be specially pleaded. In both classes of damages, the burden of proof based on the balance of probabilities in the evidence, lies on the plaintiff. Special damage consists of out-of-pocket expenses, such as hospital bills and actual loss of earning during period of total incapacity, and is generally capable of substantially exact calculation.

c

d

Fortunately, I am spared the task of examining this head because the parties magnanimously agreed before the trial court that special damages be computed at RM10,757 and I, accordingly, affirmed this award.

Conclusion

e

I dismissed the appeal of the defendants with costs. I unhesitantly affirmed the decision of the trial court in regard to the issues of liability and quantum. I too affirmed the order of the trial court that the defendants as appellants to pay the usual interest and costs thereto.

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